SUPREME COURT, U. S.

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No. 296

In the Supreme Court of the United States

OCTOBER TERM, [redacted] 1969

THOMAS KADLEC, JAMES W. KADLEC, and ISAAC GRINSTEAD,

Petitioners,

vs.

ILLINOIS BELL TELEPHONE COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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INDEX

	PAGE
Opinions Below	1
Jurisdiction	2
Statement of Grounds Upon Which This Court's Jurisdiction Is Invoked	2
Statutes Involved	3
Questions Presented	3
Statement Of The Case	4
Argument Supporting Reasons Relied on For Allowance of Petition	7
I. The Opinion of the Court of Appeals as a whole constitutes a departure from usual judicial proceedings.	7
II. The dismissal of Plaintiff's Amended Complaint was contrary to this Court's controlling decisions.	8
III. Plaintiffs demonstrated a probable violation of Amendment IV.	8
IV. IBT's acts were committed under color of law	12
V. Plaintiffs raised serious questions of violations of Amendments XIV and I.	14
Conclusion	16
Appendix:	
Statutes, etc.	App. 1-App. 5
Court Opinions:	
Court of Appeals	1
District Court (First Opinion)	9
District Court (Final Opinion)	16

TABLE OF CASES AND OTHER AUTHORITIES

PAGE

Andrews v. Ches. & Pot. Tel. Co., 83 FS 966, 968, 969 (U.S. Dt. Ct. Col. 1949) 15

Baker v. Carr, 369 U.S. 186, 199, 200 8

Bell v. Hood, 327 U.S. 678, 682 8

Berger v. New York, 388 U.S. 41, 57, 59 8

Burton v. Wilmington Par. Auth., 365 U.S. 715, 722 ..8, 12

Camara v. Mun. Ct., 18 L. Ed. 2nd 930 (1967) 9, 10, 11

Cohen v. Norris, 300 F. 2nd 24, 27-31 10

Eaton, et al v. Grubbs, 329 F. 2nd 710, 713 13

Evans v. Newton, 382 U.S. 296, 300 .....12, 13

Foman v. Davis, 371 U.S. 178, 182 8

Freedman v. Maryland, 380 U.S. 51, 59, 60 16

Go-Bart Importing Co. v. U.S., 282 U.S. 344, 356, 357 11

IBT Co. v. Miner, 136 N.E.2d 1, 8 .....13, 14

Katz v. U.S., 19 L. Ed. 2d, 576, 583 11

Laffler v. Cin. & Sub. Bell Tel. Co., 144 N.E. 2d 158 (Ohio) 13

Monroe v. Pape, 365 U.S. 1967 10

Newburyport Water Co. v. Newburyport, 193 U.S. 561, 579 8

Saia v. N.Y., 344 U.S. 588, 561, 562 15

Sarelas v. Illinois Bell Tel. Co., 192 NE2d 451, 453 (Ill. App. 1963) 13, 14

See v. Seattle, 18 L. Ed. 2d 943 (1967) 9, 10, 11

PAGE

Shelley v. Kramer, 334 U.S. 1, 19 13

Silverthorne Lumber Co. vs. U.S., 251 U.S. 385 11

Sokol v. PUC, 418 Pac. 2d 265, 270 (Cal. Sup. Ct. 1966) 14, 15

Taglianetti v. New Engl. Tel. & Tel. Co., 81 R.I. 351, 103 A. 2nd 67, 71 (1954) 12

Telephone News System v. IBT, 220 F. Sup. 621, 625 (Dt. Ct. Ill.) 15

U.S. v. Drugs, 282 F.S. 543, 545 (Dt. Ct. Fla. 1968) 10

78 Yale Law Journal, 448, 462; Public Utilities and the Poor, Jan. 1969 ..... 9, 14

CONSTITUTIONAL PROVISIONS AND STATUTES

Amendment I 3, 4, 5, 14

Amendment IV 3, 4, 5, 9, 10, 11

Amendment XIV 3, 4, 5, 14, 15

Statutes—42 U.S.C. 1983 ..... 3, 4, 10, 11, 12, 13

42 U.S.C. 1985 ..... 3, 4, 5, 10

28 U.S.C. 1343 ..... 3, 4, 10, 11

28 U.S.C. 1331 (a) 3, 4

Illinois Statutes, Ill. Rev. Stat. 1967, Chap. 111-2/3 3

Sec. 32 3

Sec. 63 ..... 3, 14

Illinois Bell Telephone Company, Reg. No. 5 ..... App. 4A

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Now comes Thomas Kadlec, James W. Kadlec and Isaac Grinstead, Petitioners herein, and respectfully prays that a Writ of Certiorari issued to review the final judgment of the Court of Appeals for the Seventh Circuit in this cause.

OPINIONS BELOW

The decision of the Court of Appeals was filed on February 25, 1969 and has not been reported. Neither was the District Court's opinion dismissing the Amended Complaint rendered on February 7, 1968 or its first opinion of October 13, 1967. All are reproduced in Petitioners' Appendix.

JURISDICTION

The judgment of the Court of Appeals was issued on February 25, 1969 and plaintiff's Petition for Rehearing was denied on April 1, 1969. The jurisdiction of this Court is founded upon 28 USC Sec. 1254 (1).

STATEMENT OF GROUNDS UPON WHICH THIS COURT'S JURISDICTION IS INVOKED

This Court's jurisdiction is invoked upon the following grounds:

1. The Court of Appeals has decided the following federal questions contrary to applicable decisions of this Court.

a. It affirmed dismissal of plaintiff's Amended Complaint though both it and the District Court apparently recognized such Complaint was predicated upon constitutional and federal questions. No finding was or could be made such issues were unsubstantial or frivolous.

b. IBT's search and entry upon plaintiff's business establishment without consent, notice, a search warrant or a hearing presented serious questions of probable violation of Amendment IV.

c. IBT's such acts and other conduct at issue here constituted acts under color of law within 42 USC 1983.

d. Damages are recoverable for violations of Amendment IV arising out of either civil or criminal proceedings under 42 U.S.C. 1983 and 28 U.S.C. 1343.

2. In the alternative the Court of Appeals departed from the accepted and usual course of judicial proceedings by entirely disregarding petitioners' claims of violation of Amendment IV.

3. In the alternative the questions referred to in paragraph 1 present important questions of federal law which

should be settled either now or ultimately by this Court. This is also true (a) whether the acts of IBT in discontinuing plaintiff's telephone service without notice or hearing violated their due process procedural rights under Amendment XIV, Sec. 1 and (b) whether IBT's acts in depriving plaintiff Grinstead of all means of telephone communication without prior notice or a hearing violated Amendment I.

STATUTES INVOLVED

The federal statutes involved are 42 U.S.C. 1983, 1985 28 U.S.C. 1331 (a) and 1343. The constitutional provisions are Amendments I, IV and XIV, Sec. 1 of the Constitution. IBT is alleged to have acted under color of law as a public utility pursuant to chap. 111⅔ Ill. Rev. Stat., 1967 and more particularly, Sec. 32 par. 3 IBT Regulation 5 is included in the opinion of the Court of Appeals. (p. 2)

QUESTIONS PRESENTED

1. Did plaintiffs Amended Complaint raise serious questions whether defendant's (IBT's) acts were under color of law within 42 U.S.C. 1983.

2. Did plaintiffs raise serious questions under Amendments I, IV, or XIV Sec. 1 or either of them.

3. Were plaintiffs erroneously denied a trial of the merits since both courts treated the issues or one or more of them as substantial and made no finding that the Amended Complaint was frivolous or unsubstantial.

4. Assuming the facts pleaded can be established at the trial were Plaintiffs, or either of them, denied rights, privileges or immunities secured by the Constitution and laws of the United States within 42 U.S.C. 1983, 1985 and 28 U.S.C. 1343.

STATEMENT OF THE CASE

The original complaint was filed by plaintiffs Thomas Kadlec and James Kadlec. Upon the filing of the Amended Complaint (referred to by the Court of Appeals as the second Amended Complaint as amended) Isaac Grinstead was added as a Plaintiff. The Court of Appeal's statement of facts is predicated almost entirely upon the original complaint but it omitted material allegations found in all pleadings. In this Petition, Petitioners though relying upon his Amended Complaint as amended (hereinafter referred to as Amended Complaint or A.C.) finds it necessary to supplement the statement of facts (p. 1-3) of the Court of Appeal's opinion for it not only has disregarded the crux of such pleadings, but also contains other serious errors with respect to all pleadings.

Plaintiff sought damages against IBT under 42 U.S.C. 1983, 1985, 28 U.S.C. 1331(a) 1343, and Amendments I, IV and Sec. 1 of Amendment XIV. (par. 3 AC) Such damages were claimed "for the deprivation of rights and privileges secured by the laws and Constitution . . . arising out of (a) its unlawful entry under color of law upon the property of the Plaintiffs or one or more of them (b) the abridgement of the right of freedom of speech and means of communication under color of law in violation of Amendment I, and denial of due process in violation of Section 1 of Amendment XIV and (c) the violation of 28 U.S.C. Sec. 1983 and 1985 by acts more fully shown herein." (par. 4 A.C.).

1. Plaintiffs' Amended Complaint included the following allegations relevant to Amendment IV.

(20) "On or about March 16, 1967, IBT, its agents and employees or either of them, entered the

property of the plaintiffs, Thomas Kadlec and James W. Kadlec, or one or more of them, in Niles and Kankakee County, Illinois and engaged in a search of such premises and property."

(21) "Such search was conducted by IBT under color of law."

(22) "Such search was conducted by IBT without prior notice to the plaintiffs or either of them or without their consent." (Last four words added by Amendment R. 173, App. 12)

(23) "Such search was conducted without a hearing, a search warrant or judicial proceeding."

(24) "Said search constituted an unreasonable search in violation of Amendment IV of the Constitution of the United States and (R. 111) constituted a deprivation of the rights of plaintiffs secured by the Constitution and the laws of the United States." (R. 110, 111; App. 7, 8)

2. The Court of Appeals thus committed an error when it said (p. 3):

"The sole issue presented is whether defendant's conduct of discontinuing plaintiff's Call-Pak service, fell within the purview of the Civil Rights Act, 42 U.S.C.A. 1983."

3. The first complete paragraph on page 2 is also in error in stating that IBT contracted with Thomas Kadlec to install three Call-Pak lines including one in Grinstead's trailer. Grinstead (night-watchman) had no such telephone facilities and the Amended Complaint alleges that telephone service was used by him and his wife for usual residential purposes (par. 10) except for occasional use to aid in protecting Tom Kadlec's business against fire or theft. (par. 11) Grinstead's bills seldom exceeded $10 per month. (par. 13)

4. The statement (p. 2) that IBT shut off the Call-Pak service because it determined the service was used for other than residential purposes was not supported by allegations in plaintiff's pleadings and in fact, IBT made a variety of ex-parte judgments of alleged illegal use (non-criminal in character) without notice or a hearing.

5. The reference (p. 3) to the District Court's final opinion is incomplete in that it fails to state that the District Court specifically, though erroneously concluded, plaintiff's allegations with respect to Amendment IV did not come within the principles of the *Camara and See* cases (18 L Ed 2d 930, 18 L Ed 2d 943).

6. Plaintiff not only alleged that IBT's acts were under color of law and regulations of the state of Illinois, but such regulations were null and void and contrary to Amendments I, IV, and XIV. (pars. 21, 29, 31) It was further alleged that IBT acted in concert with officers and agents as well as agents of the state of Illinois in depriving plaintiffs or one or more of them of their civil rights and equal protection of the laws in violation of 42 U.S.C. 1985. (par. 32)

7. The Court's reference to the initial pleading omits allegations that the entry was upon threat of discontinuing all Plaintiffs' telephone service in Kankakee and Niles, Illinois, and that they entered and seized telephone equipment previously used upon the threat of discontinuing all Plaintiffs' telephone service and that all such acts were under color of law or by virtue of regulations having the force and effect of law. IBT was also accused during such search of secretly collecting information "as to the law abiding character of such subscribers". (IBT App. 7, 8)

ARGUMENT SUPPORTING REASONS RELIED ON FOR THE ALLOWANCE OF PETITION

I. THE OPINION OF THE COURT OF APPEALS AS A WHOLE CONSTITUTES A DEPARTURE FROM USUAL JUDICIAL PROCEEDINGS.

Opinions of the Court of Appeals are not expected to be standardized but this Opinion has strange aspects affecting the substance of Petitioners' rights. It is apparent that the Court ruled primarily upon the original complaint, relied on only a few of its allegations, disregarded the crux of both the initial and final pleadings and in lieu of a trial on the merits substituted its speculations as to material facts.

By their Amended Complaint filed after the first opinion of the District Court they eliminated demands for restoration of service, injunctive orders and confined their claims to damages arising out of the alleged numerous wrongful acts of the defendant, IBT, in searching the residential and business premises of the plaintiffs and shutting off their service without notice, a hearing, a search warrant or their consent. Since the Court of Appeals considered the initial complaint relevant, it was strange it omitted all reference to the search and entry upon plaintiffs' premises under threat of discontinuing all telephone service. (IBT App. p. 7)

It may have been possible for the Court of Appeals to have reached a correct conclusion without a single reference to any of the opinions of this Court, but their proper purpose is to instruct not only the bar but all courts seriously concerned with proper determination of constitutional rights.

II. THE DISMISSAL OF PLAINTIFFS' AMENDED COMPLAINT WAS IN CONFLICT WITH THIS COURT'S CONTROLLING DECISIONS.

Since 1902 or earlier, this Court has repeatedly declared it to be improper to dismiss a suit instituted in a federal court upon claims arising under the Constitution and laws of the United States other than by a judgment on the merits. This rule is especially applicable where, as here, subject matter jurisdiction is recognized. This rule permits dismissal only when the claim is found "so attentuated and unsubstantial as to be absolutely devoid of merits". *Newburyport Water Co.* v. *Newburyport,* 193 US 561, 579. These and other leading opinions so holding were reviewed in *Baker* v. *Carr,* 369 US 186, 199, 200. See also *Bell* v. *Hood,* 322 U.S. 678, 682.

Even in non-constitutional cases, this Court declared in *Foman* v. *Davis,* 371 US 178, 182:

> "If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits."

Neither the District Court or the Court of Appeals found plaintiffs' claims unsubstantial or frivolous. Their opinions failed to refer to or to distinguish these principles or refer to any of the rulings of this Court pronouncing them.

Illustrating the need for a trial in a case such as this presenting new issues of state involvement in private conduct, this Court in *Burton* v. *Wilmington Park. Auth.,* 365 US 715, 722, declared it can be done only "by sifting facts and weighing circumstances."

Operations by public utilities are far from exclusively private conduct. In fact the ruling by the Court of Appeals that regulations filed by IBT with the state and its conduct thereunder does not constitute acting under the

authority or pretense of an Illinois statute or a regulation defies elementary recognition that tariffs and regulations of utilities are approved by state or federal regulatory agencies. Petitioners' contention finds support in 78 Yale Law Journal, 448, 462, Public Utilities And The Poor, January 1969. The need for a hearing is further shown by Judge Kerner's separate opinion, even though the obvious answer to the first of the six factors is in the affirmative.

Plaintiffs were arbitrarily denied the benefit of the principle entitling them to a hearing on the merits.

III. PLAINTIFFS ALLEGED FACTS DISCLOSING AT LEAST A PROBABLE VIOLATION OF AMENDMENT IV.

The Court of Appeals departed from the accepted and usual course of judicial proceedings by failing to consider Plaintiffs' primary claim *I B T's* search and entry upon their premises presented a serious question under the Fourth Amendment. The District Court considered the issue but erroneously concluded inapplicable this Court's recent decisions in *Camara* v. *Mun.Ct.*, 18 L.Ed. 2d 930 (1967); and *See* v. *Seattle*, 18 L.Ed. 2nd 943. It said:

> "Illinois Bell, although a public utility, it is not a governmental entity. Defendant's right to inspect its equipment at reasonable hours is set forth in the tariff regulations governing its operations. Plaintiffs have not made a persuasive argument to justify extending the rationale of *See* and *Camara*, and we shall not do so. Hence, plaintiff's allegations on this point do not state a claim upon which this action may be based."

The application of Amendment IV to acts of administrative agencies was upheld in *See* v. *Seattle*, 387 U.S. 541, 545 which declared that administrative subpoenas are governed by the 4th Amendment. While agreeing that such

agencies possessed the right to conduct all reasonable inspections, searches must be predicated upon the designation of documents in a formal subpoena, they may not be made "and enforced by the inspector in the field and the subpoenaed party may obtain judicial review of the reasonableness of the demand prior to suffering penalties for refusing to comply". (p. 544, 545).

Insofar as the Court's silence on Plaintiffs' claims under 1983, 1985 and 1343, as related to Amendment IV should be interpreted as a holding that they do not permit recovery of damages arising out of civil proceedings, the Court is in error.

The application of Amendment IV to state action is no longer open to question. This Court has held it applicable to both criminal and civil proceedings. In *Monroe* v. *Pape*, 365 U.S. 167 the Court's jurisdiction was asserted as here under 42 U.S.C. 1983, 28 U.S.C. 1343 and 28 U.S.C. 1331. Damages were held recoverable for violation of Amendment IV by a person charged with a state crime. This decision was followed in *Cohen* v. *Norris*, 300 F.2d 24, 27-31. Damages would also be recoverable here for in *Camara* and *See*, this Court held Amendment IV applicable to state action violative of Amendment IV arising out of civil proceedings. In *U. S.* v. *D. or S. Drugs*, 282 F.S. 543, 545, (DT. Ct. Fla. 1968) held Amendment IV applicable to civil seizures relying upon this Courts recent holdings that it had cut away from "technical distinctions (and) emphasizing the Amendments substantive protection of a man's privacy against government intrusion". If we are correct in contending that IBT acted under color of law or a serious question exists as to whether it did, plaintiffs were entitled to a trial and this Court should grant this Petition.

By such IBT's search of Plaintiffs' premises without consent or a search warrant, IBT not only acted under color of law but it deprived Plaintiffs or one or more of them of rights, privileges and immunities secured by the constitution and for which damages are recoverable under 28 U.S.C. 1343 (1) (3) and 42 U.S.C. 1983.

The issue here is whether IBT, by the mere filing of a general regulation approved by an Illinois agency, can deny its customers all prior opportunity for a hearing, notice or consent to the entry upon customers' premises. Surely the state has intervened, for by the filing of the regulation and approval, utilities such as IBT avoid liability for trespass.

If Illinois may not send its agents into the homes of millions of its citizens, to check or investigate the legal or illegal use of equipment in bedrooms, kitchens, playrooms and business offices or properties, can it confer such blanket authority upon a public utility? We think not.

The concern this Court has exhibited over the protection of people under Amendment IV in the recent cases illustrated by *See, Camara, Katz* v. *U.S.*, 19 L. Ed. 2d 576, 583; *Berger* v. *New York*, 388 U.S. 41, 57, 59; *Silverthorne Lumber Co.* v. *U.S.*, 251 U.S. 385; *Go-Bart Importing Co.* v. *U.S.*, 282 U.S. 344, 356, 357.

The holding of this Court in *Katz* that his protection applies "to a home, an office, or hotel room" or a telephone booth. *"Wherever a man may be, he is entitled to know he will remain free from unreasonable searches and seizures"*. (p. 358) The protection afforded the public under the Fourth Amendment from government agencies and agents would be meaningless if the state can confer such illegal power upon agents of private, quasi private or public companies.

This paramount issue was improperly disregarded by the Court of Appeals and was erroneously decided by the District Court.

IV. THE COURT ERRONEOUSLY CONCLUDED IBT'S ACTS WERE NOT COMMITTED UNDER COLOR OF LAW.

The ruling of the Court of Appeals affirming the District Court's dismissal was largely predicated upon the decision in *Taglianetti* v. *New England Tel & Tel Co.*, 81 R.I. 351, 103 A. 2d 67, 71 (1954). It rejected reliance upon *Evans* v. *Newton*, 382 U.S. 396, 300 and *Burton* v. *Parking Authority*, 365 U.S. 715 in favor of a state decision unconcerned with the special obligations imposed upon the federal courts to independently determine civil rights and constitutional issues in the light of this Court's pronouncements. Moreover, its conclusions are wholly at war with the proper conception of section 1983 and the participation by the state in IBT's conduct.

The Rhode Island view that for purposes of state law, tariffs are not acts of the state, are not binding on the federal court's independent duty to interpret Sec. 1983. Furthermore, the Rhode Island view of tariffs are simply designed to inform patrons of their rights (or lack of them) is inconsistent with the holdings of the Illinois Courts. Under Illinois law the tariffs are the true and sole source of obligations, a principle written into Illinois law, when IBT found it to its economic advantage to request the Illinois Courts to adopt it. In *Sarelas* v. *Illinois Bell Tel. Co.*, 42 Ill. App. 2d 372, IBT through State cooperation and participation was absolved from an action for damages when the Court held:

> "This duty has but one source, the tariff, which in this instance is on file with the Illinois Commerce Commission."

And in another IBT case, *IBT Co.* v. *Miner*, 11 Ill. 2d 44, again through state participation and co-operation, the Court adopted the view that its tariffs by operation of law bind both the subscribers and the company. In other words IBT's attorneys "motivated by purely economic interest" (p. 4) promote different legal concepts in the state and federal courts for the identical object of nullifying public protection under both sets of statutes. *Miner* held the tariffs gave IBT power to bar the sale of telephone directory covers.

We are not alone in the view that utility tariffs represent state action under 28 U.S.C. 1983. A recent Yale Law Journal discussing utility tariffs states:

> "Lying behind these questions, and lending them special significance, are serious constitutional problems of due process and equal protection. Though some courts have failed to see 'state action' in the filing and approval of a utility tariff, state regulation and supervision of public utilities constitute sufficient intervention to cloak a deposit requirement with governmental authority."[1]

A search and entry into a private home or business property is far greater evidence of governmental authority and state participation in the conduct of a utility than the requirements of deposits under other tariffs approved by regulatory agencies. Except for state intervention, *Shelley* v. *Kramer*, 334 U.S. 1, 19, IBT would not enter the premises of Plaintiffs or its other customers.

In *Evans* v. *Newton* the Court declared the test of state action includes "functions government in nature", (p. 300). Under this premise the Court in *Eaton et al.* v. *Grubbs*, 329 F.2d 710, 713 held that since the hospitals in-

[1] 78 Yale Law Journal, 448, 462; Public Utilities and the Poor Jan. 1969.

volved have been granted the power of eminent domain they were subject to 42 U.S.C. 1983 and Amendment XIV. IBT possesses such power. Chap. 111⅔ Ill. Rev. Stat. 1965 Sec. 63.

The Court's conclusion (pp. 4, 5) that the state did not cooperate, benefit, or that IBT's acts did not depend upon "orders of the state" (p. 5 FM) is contrary to Plaintiffs' allegations and common knowledge. First of all it was alleged that IBT's acts in discontinuing service and entering upon the premises of its customers were based on regulations, (par. 5 AC), that the regulations and rules and laws of Illinois or IBT violated Amendments I, IV and XIV and that the acts in shutting off service was under regulations of the state (par. 29) and had the force and effect of law. (Df.'s App. p. 7). This principle was confirmed in *Miner* and *Sarelas, supra.*

It is common knowledge that all such regulations are approved by state agencies. The purpose of the regulatory scheme is to assure an adequate system of telephone service and the regulations to the extent to which they fulfill these objects benefit the state. The state thus contrary to the erroneous conclusion of the Court of Appeals benefit, cooperate and approve the regulations.

V. PLAINTIFFS RAISED SERIOUS QUESTIONS OF VIOLATIONS OF AMENDMENT XIV AND I.

By IBT's acts in shutting off Plaintiff Grinstead's sole source of telephone communication with the outside world he was denied rights under both Amendments I and XIV. He was denied any prior notice or an opportunity for a hearing. His trailer was located in a non-populated area of Kankakee. In *Sokol* v. *Public Utilities Commission*, 418 Pac. 2d 265, 270, (1966), the California Supreme Court re-

cently held the arbitrary discontinuance of telephone service "also affects his right of free speech as guaranteed by the First Amendment of the federal constitution" for it denies the public the means employed for the dissemination of speech. See also *Saia* v. *N. Y.*, 334 U.S. 558, 561, 562.

The Court of Appeals disregarded state and federal Court rulings holding that arbitrary discontinuance of telephone service may deny a subscriber's rights of due process. In *Telephone News System* v. *IBT*, 220 F. Sup. 621 Judge Hoffman of the District Court declared "It seems probable that one's right to telephone service is a property right within the protection of this Amendment". (p. 625) The discontinuance of telephone service without prior notice or an opportunity for a hearing violates due process under: *Sokol* v. *PUC*, 418 Pac 2d, 265, (Cal. Sup. Ct. 1966); *Laffer* v. *Cin. & Suburban Bell Tel. Co.*, 144 N.E. 2d 158 (Ohio); *Andrews* v. *Ches. & Pot. Tel. Co.*, 83 FS 966, 968, 969 (US DT. Ct. Col. 1949).

In *Andrews* the District Court condemned as contrary to due process the ex parte discontinuance of telephone service by either a utility or a public utility regulatory agency.

In the *Telephone News* case, also IBT, the Court declared federal statute providing for the discontinuance of telephone service (18 U.S.C. 1084 (d)) was valid as it expressly provided for notice, hearing and an opportunity for judicial intervention prior to discontinuance of service. Here IBT becomes the judge and prosecutor when, without notice or hearing, it enters and searches a business establishment, and shuts off telephone service because it believes Plaintiffs may have violated its regulations.

Plaintiffs were denied the benefits of the principle that one who seeks to restrain freedom of communication must first obtain some type of specific judicial approval after a hearing. *Freedman* v. *Maryland,* 380 U.S. 51, 59. This case does not come within the category of the principle that a utility may discontinue service for a nonpayment of bills but even in such instances it must first give notice. Plaintiffs were denied even this slight symbol of due process.

CONCLUSION

Petitioners having demonstrated serious errors affecting constitutional rights in the opinion and judgment of the Court of Appeals, they pray that this Honorable Court grantd this Petition for a Writ of Certiorari.

Respectfully submitted,

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